Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-01(W)-55–02 OF 2016 AND W-01(W)-56–02 OF 2016
ZAWAWI SALLEH, VERNON ONG AND ABDUL RAHMAN SEBLI JJCA
28 APRIL 2017

Damages — Assessment — Appeal against assessment — Senior assistant registrar ('SAR') awarded scrap-metal trader trading on unlicensed premises general, special, aggravated and exemplary damages against local authority for demolishing her premises and seizing and converting her goods — Whether quantum on various heads of damages awarded by SAR were fair and reasonable — Whether judicial commissioner right to disturb awards made

In the first appeal herein ('Appeal No 55'), the appellant was a scrap-metal trader who had failed to obtain a trading licence and approval to construct a structure on her trading premises from the Datuk Bandar Kuala Lumpur ('DBKL'), whose officers were the remaining two respondents. In an enforcement action, the respondents demolished the structure on the appellant's premises and seized her goods. The goods were never returned to her. The appellant sued the respondents in the High Court for, among other things, trespass, conversion and detinue. The trial court allowed her claim and ordered damages to be assessed by the senior assistant registrar ('SAR'). After hearing the arguments of the parties, the SAR awarded the appellant RM2,012,100 in special damages, RM2m in general damages, RM2m in aggravated damages and RM2,503,000 in exemplary damages. On appeal against the assessment, the judicial commissioner ('JC') reduced the awards for special damages and general damages to RM55,000, upheld the RM2m for aggravated damages and awarded 25% of the total of the special, general and aggravated damages, namely RM527,500, as exemplary damages. The appellant appealed against the whole of the JC's decision while in the second appeal herein ('Appeal No 56'), the respondents only appealed against the awards for exemplary and aggravated damages, contending, inter alia, that since they were only carrying out their statutory duties in the enforcement action, it was wrong of the court to have awarded aggravated and exemplary damages against them which were punitive in nature. Both the SAR and the JC were, however, of the view that the awards were justified because the actions of the respondents had violated the constitutional rights of the appellant.

Held, allowing both appeals in part such that the amounts payable to the

appellant in Appeal No 55 were as follows: RM2,012,100 for special damages, RM55,000 for general damages, RM300,000 for aggravated damages and RM703,025 for exemplary damages:

(1) The RM55,000 awarded by the JC for general damages was fair and reasonable. The evidence showed that the appellant in Appeal No 55 did not produce sufficient evidence, such as a medical report, to corroborate her claim that she and her family had suffered stress and trauma as a result of the respondents' trespass, conversion and detinue. There was, however, some evidence to establish that she had endured hardship when the respondents wrongly seized her goods in their raid and she had lost her capital and could not pay off her business creditors as the monies loaned were invested in the seized goods and, consequently, the appellant was forced to sell her assets, including her car, house and jewellery (see paras 15–17).

(2) The JC erred in law and in fact when he reduced the SAR's award for special damages. During the assessment of damages proceedings, the appellant, in addition to tendering her own supporting documents, had relied on the evidence of a chartered accountant ('SP1') who had tendered various documents in support of his witness statement such as the financial reports, tax computation and management accounts of the appellant's scrap-metal business. Based on the documentary evidence, the SAR found that the market price of the goods that had been seized was RM2,012,100 at the time of their conversion. At no time during the assessment of damages proceedings was the financial statements disputed, nor was it pleaded so. The JC had stepped out of the pleadings of the parties and reduced the special damages award by way of his own calculation employing a 'straight line base method'. The SAR was right in awarding RM2,012,100 for special damages and there was no cogent reason to disturb that award (see paras 20–24 & 28).

(3) Taking the following factors into consideration — the legality of the enforcement action; the length of time (3+ years) given by DBKL to the appellant to right matters before the enforcement action was actually taken; the appellant's disregard of the warnings/notices; the absence of malice on the part of the respondents; the fact that the appellant knew that her business premises was unlicensed and also that enforcement action was forthcoming — a reasonable and fair amount in aggravated damages was RM300,000. Applying the principles in *Sin Heap Lee – Marubeni Sdn Bhd v Yip Shou Shan* [2005] 1 MLJ 515, that the award for exemplary damages should be calculated at 25% of the total award for compensatory damages, the sum awarded to the appellant for exemplary damages was RM703,025 (see para 42).

(4) The court agreed with the concurrent findings of the SAR and the JC that the appellant was entitled to exemplary damages. The trial judge found

that although the respondents had the right to remove the appellant's goods from the land concerned, they did not have the right to convert the goods. By converting the seized goods, the respondents had deprived the appellant of her right under art 13 of the Federal Constitution. The respondents, as government servants, had acted in an oppressive and unconstitutional manner and therefore the appellant was entitled to an award for exemplary damages (see para 35).

Obiter:

Exemplary damages were not intended to compensate the plaintiff and were not recoverable as a matter of right. The amount of exemplary damages awarded was left to the judge's discretion and was determined by considering the character of the defendant's misconduct, the nature and extension of the plaintiff's injury and the means of the defendant. The quantum of exemplary damages to be awarded must be appropriate to the wrongdoing inflicted on the parties involved. It must not be uncontrolled or arbitrary and must be of an amount that was the minimum necessary to achieve its purpose in the context of a particular case (see para 43).

[Bahasa Malaysia summary

Dalam rayuan pertama di sini ('Rayuan No 55'), perayu merupakan seorang peniaga besi buruk yang telah gagal mendapatkan lesen perniagaan dan kebenaran untuk membina sebuah struktur di atas premis perniagaannya daripada Datuk Bandar Kuala Lumpur ('DBKL'), yang mana pegawainya merupakan kedua-dua responden. Dalam tindakan penguatkuasaan, responden merobohkan struktur di atas premis perayu dan menyita barangannya. Barang tersebut tidak pernah dikembalikan kepadanya. Perayu menyaman responden di Mahkamah Tinggi, untuk, antara lain, pencerobohan, penukaran dan detinu. Mahkamah perbicaraan membenarkan tuntutannya dan memerintahkan ganti rugi untuk ditaksir oleh penolong kanan pendaftar ('PKP'). Selepas mendengar hujahan pihak-pihak, PKP mengawardkan perayu RM2,012,100 dalam ganti rugi khas, RM2 juta dalam ganti rugi am, RM2 juta untuk ganti rugi tambahan dan RM2,503,000 dalam ganti rugi teladan. Semasa rayuan terhadap taksiran, pesuruhjaya kehakiman ('PK') mengurangkan award untuk ganti rugi khas dan ganti rugi am kepada RM55,000, mengekalkan RM2 juta untuk ganti rugi tambahan dan mengawardkan 25% untuk keseluruhan ganti rugi khas, am dan tambahan, iaitu RM527,500, sebagai ganti rugi teladan. Perayu merayu terhadap keseluruhan keputusan PK manakala dalam rayuan kedua di sini ('Rayuan No 56'), responden hanya merayu terhadap award untuk ganti rugi teladan dan tambahan, menghujahkan, antara lain, bahawa memandangkan mereka hanya menjalankan kawajipan statutori mereka dalam tindakan penguatkuasaan, adalah salah untuk mahkamah mengawardkan ganti rugi tambahan dan teladan ke atas mereka yang bersifat menghukum. Kedua-dua PKP dan PK, walau bagaimanapun, berpendapat bahawa award itu adalah wajar kerana tindakan responden telah melanggar hak perlembagaan perayu.

Diputuskan, membenarkan sebahagian rayuan seperti amaun perlu dibayar kepada perayu dalam Rayuan No 55 adalah seperti berikut: RM2,012,100 untuk ganti rugi khas, RM55,000 untuk ganti rugi am, RM300,000 untuk ganti rugi tambahan dan RM703,025 untuk ganti rugi teladan:

(1) RM55,000 yang diawardkan oleh PK untuk ganti rugi am adalah adil dan munasabah. Keterangan menunjukkan bahawa perayu dalam Rayuan No 55 tidak mengemukakan keterangan yang mencukupi, seperti laporan perubatan, untuk menyokong tuntutannya bahawa dia dan keluarganya telah mengalami tekanan dan trauma akibat pencerobohan, penukaran dan detinu responden. Walau bagaimanapun, terdapat, beberapa keterangan untuk membuktikan bahawa dia mengalami kesukaran apabila responden telah secara salah menyita barangannya dalam serbuan mereka dan dia telah kerugian modalnya dan tidak mampu membayar pemiutang perniagaannya kerana wang yang dipinjamkan telah dilaburkan kepada barang yang disita dan, akibatnya, perayu terpaksa menjual asetnya, termasuk kereta, rumah dan barang kemas (lihat perenggan 15–17).

(2) PK terkhilaf dalam undang-undang dan fakta apabila beliau mengurangkan award PKP untuk ganti rugi khas. Sewaktu penaksiran prosiding ganti rugi, perayu, di samping mengemukakan dokumen sokongannya sendiri, telah bergantung kepada keterangan akauntan bertauliah (SP1) yang telah mengemukakan pelbagai dokumen dalam menyokong kenyataan saksinya seperti laporan kewangan, pengiraan cukai dan akaun pengurusan perniagaan skrap-logam perayu. Berdasarkan keterangan dokumentari, PKP mendapati bahawa harga pasaran barangan yang telah disita adalah RM2,012,100 pada waktu penukaran. Tidak ada semasa penilaian prosiding ganti rugi, penyata kewangan dipertikaikan, dan tidak juga diplidkan. PK telah melangkah keluar dari pliding parti-parti dan mengurangkan award ganti rugi khas dengan cara pengiraan sendiri menggunakan 'straight line base method'. PKP adalah betul dalam mengawardkan RM2,012,100 untuk ganti rugi khas dan tidak ada sebab untuk mengganggu award itu (lihat perenggan 20–24 & 28).

(3) Mengambil kira faktor berikut — kesahihan tindakan penguatkuasaan; tempoh masa (tiga tahun lebih) yang diberikan oleh DBKL kepada perayu terhadap perkara itu sebelum tindakan penguatkuasaan telah diambil, perayu tidak memperdulikan amaran/notis; ketiadaan niat jahat oleh pihak responden; fakta bahawa perayu mengetahui bahawa premis perniagaannya tidak berlesen dan tindakan penguatkuasaan yang akan datang — amaun munasabah dan adil untuk ganti rugi tambahan adalah RM300,000. Mengguna pakai prinsip dalam kes *Sin Heap Lee – Marubeni Sdn Bhd v Yip Shou Shan* [2005] 1 MLJ 515, bahawa award untuk ganti rugi teladan hendaklah dikira pada 25% dari keseluruhan

award untuk ganti rugi pampasan, jumlah diawardkan kepada perayu untuk ganti rugi teladan adalah RM703,025 (lihat perenggan 42).

(4) Mahkamah bersetuju dengan dapatan bersama PKP dan PK bahawa perayu berhak untuk ganti rugi teladan. Hakim perbicaraan mendapati bahawa walaupun responden mempunyai hak untuk membuang barang perayu dari tanah berkaitan, mereka tidak mempunyai hak untuk menukar barang itu. Dengan menukar barangan yang disita, responden telah melanggar hak perayu di bawah perkara 13 Perlembagaan Persekutuan. Responden, sebagai penjawat awam, telah bertindak dalam kelakuan yang menindas dan tidak mengikuti perlembagaan dan oleh itu perayu berhak kepada award untuk ganti rugi teladan (lihat perenggan 35).

Obiter:

Ganti rugi teladan tidak bertujuan untuk memampas plaintif dan tidak boleh didapatkan kembali sebagai perkara yang betul. Jumlah ganti rugi teladan yang diawardkan adalah diletakkan atas budi bicara hakim dan ditentukan dengan mempertimbangkan watak salah laku defendan, sifat dan lanjutan kecederaan plaintif dan cara defendan. Kuantum ganti rugi teladan untuk diawardkan hendaklah berpatutan dengan salah laku yang dilakukan ke atas pihak-pihak terlibat. Ia mestilah tidak terkawal atau sewenang-wenang dan mestilah jumlah minimum yang diperlukan untuk mencapai tujuannya dalam konteks kes tertentu (lihat perenggan 43).]

Notes

For cases on appeal against assessment, see 6(2) *Mallal's Digest* (5th Ed, 2015) paras 303–305.

Cases referred to

AB and others v South West Water Services Ltd [1993] 1 All ER 609, CA (refd)
Broome v Cassell & Co Ltd [1971] 2 QB 354, CA (refd)
BMW of North America, Inc v Gore (1996) 116 SCt 1589, SC (refd)
CM Van Stillevoldt BV v EL Carrier Inc [1983] 1 WLR 207, CA (refd)
Hong Leong Bank Bhd v Soh Seow Poh [2009] 4 SLR 525, CA (refd)
J Jermons v Aliammal & Ors (1999) 7 SCC 382, SC (refd)
John v MGN Ltd [1997] QB 586, CA (refd)
Koh Sin Chong Freddie v Chan Cheng Wah Bernard and others and another appeal [2013] 4 SLR 629, CA (refd)
Laksmana Realty Sdn Bhd v Goh Eng Hwa and another appeal [2006] 1 MLJ 675, CA (refd)
Mahmod Binkailan v Goh Seng Choon & Anor [1976] 2 MLJ 239, FC (refd)
McIntyre v Lewis [1991] 1 IR 121, SC (refd)
Ong Ah Long v Dr S Underwood [1983] 2 MLJ 324, FC (refd)
Rookes v Barnard [1964] 1 All ER 367, HL (refd)

A *Sin Heap Lee – Marubeni Sdn Bhd v Yip Shou Shan* [2005] 1 MLJ 515, CA (folld)
Stroms Bruks Akt Bolag v Hutchison [1905] AC 515, HL (refd)
Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor [1993] 1 MLJ 443, HC (refd)
B *Thompson v Commissioner of Police of Metropolis* [1997] 2 All ER 762, CA (refd)
Topaiwah v Salleh [1968] 1 MLJ 284, FC (refd)

Legislation referred to

C Federal Constitution art 13
Second Hand Dealers Act 1946

Appeal from: Civil Suit No S6–21–159 of 2008 (High Court, Kuala Lumpur)

D *Zamani Ibrahim (Hanif Idris and Amran Aminuddin with him) (Zamani Ibrahim) in Civil Appeal No W-01(W)-55–02 of 2016 for the appellant.*
Wong Huk Mun (Tan Ru En with him) (Che Mokhtar & Ling) in Civil Appeal No W-01(W)-56–02 of 2016 for the appellants.
Wong Huk Mun (Tan Ru En with him) (Che Mokhtar & Ling) in Civil Appeal
E *No W-01(W)-55–02 of 2016 for the respondents.*
Zamani Ibrahim (Hanif Idris and Amran Aminuddin with him) (Zamani Ibrahim) in Civil Appeal No W-01(W)-56–02 of 2016 for the respondent.

Zawawi Salleh JCA (delivering judgment of the court):

F

INTRODUCTION

[1] Before us there are two appeals, namely, W-01(A)-55–02 of 2016 ('Appeal 55') and W-01(W)-56–02 of 2016 ('Appeal 56') emanating from one
G judgment of the learned judicial commissioner ('JC') of the High Court at Kuala Lumpur. Both the appeals were heard together as they are based on the same factual matrix and issues.

[2] Appeal 55 is an appeal by the plaintiff against the whole of the
H learned JC's decision while Appeal 56 is an appeal by the defendants against the part of the decision involving the award of exemplary and aggravated damages.

[3] For ease of reference, in this judgment, the parties will be referred to as they were in the High Court.

I

FACTS OF THE CASE

[4] To put the issues in these appeals in proper perspective, a brief narration of the facts of the case is necessary and may be shortly stated as follows:

(a) the plaintiff was a scrap metal trader. His trading premises were rented from the Kuala Lumpur City Hall Workers Union;

(b) the plaintiff had a valid business registration licence from the registrar of business and exemption certificate from the Royal Malaysian Police pursuant to the Second Hand Dealers Act 1946;

(c) however, the plaintiff did not have a licence for premises and approval from the first defendant to construct the structure on the land concerned;

(d) on 16 January 2008, the defendants carried out the enforcement action and demolished the structure located on the land concerned and seized certain goods of the plaintiff which assets were never returned to her;

(e) the plaintiff then filed the present suit against the defendants for trespass, conversion and detinue, negligence, breach of statutory duty, conspiracy and misfeasance in public office;

(f) at the trial before the learned Hue Siew Kheng J, the sole issue for determination was whether the defendants in the course of carrying out their enforcement action to demolish illegal structures erected by the plaintiff on the land concerned had or had not acted unlawfully or negligently in committing the acts of trespass, conversion and/or detinue;

(g) the learned Hue Siew Kheng J allowed the plaintiff's claim against the defendants and ordered that the damages be assessed by the senior assistance registrar ('SAR');

(h) the defendants dissatisfied with the findings of liability and appealed against the said decision to the Court of Appeal vide Civil Appeal No W-01–463–10 of 2012. The Court of Appeal dismissed the defendants appeal and affirmed the decision of the learned Hue Siew Kheng J and the matter was remitted back to the High Court for assessment of damages before the SAR;

(i) on 1 July 2016, the learned SAR assessed the damages as follows:

Special damages	RM2,012,100
General damages	RM2,000,000
Aggravated damages	RM2,000,000
Exemplary damages	RM2,503,000
Total	RM7,515,125

(j) being dissatisfied with the SAR's award, the defendant appealed to the High Court;

(k) the High Court (Azizul Azmi Adnan JC presiding) reduced the damages to the following:

Special damages	RM55,000
General damages	RM55,000
Aggravated damages	RM2,000,000
Exemplary damages	RM527,500
Total	RM2,637,500

(l) both parties were dissatisfied with the quantum of award. Hence, the appeals before us.

THE APPEALS

[5] Stripped to its bare essentials, the plaintiff's main criticisms against the award rendered by the learned JC may be summarised as follows:

(a) the learned JC had erred in law and/or in fact in reducing the quantum award of special damages based on issues of the financial statements which the learned JC himself has admitted were never raised in the assessment of damages proceedings before SAR;

(b) the learned JC had erred in law and/or in fact in reducing the quantum of award of general damages as His Lordship did not find that the SAR had acted upon a wrong principle of law; and

(c) the learned JC had erred in law and/or fact in reducing the quantum award of special damages and general damages and consequently reduced the quantum award of exemplary damages.

[6] The defendants' main contention is that aggravated damages ought not to have been awarded at all or alternatively the award of RM2m is excessive and ought to be reduced.

DISCUSSION AND DECISION

[7] Before we dwell upon the competing submissions advanced by the parties, it would be useful to remind ourselves of certain trite principles.

[8] First, the Court of Appeal may interfere with the decision of a judge in chambers (in relation to an appeal from the registrar) but only on well-established principles of appellate intervention (see *CM Van Stillevoldt BV v EL Carrier Inc* [1983] 1 WLR 207 at pp 208–209). The Court of Appeal may interfere with the quantum of damages awarded by the judge only if it is shows that the latter:

(a) acted on the wrong the principles;

(b) misapprehended the facts; and

(c) had for these or other reasons made a wholly erroneous estimate of his damages.

[9] In Singapore case of *Hong Leong Bank Bhd v Soh Seow Poh* [2009] 4 SLR 525, the court held that the Court of Appeal can only interfere to overrule the discretion of a judge in awarding damages where:

(a) the judge was misguided with regard to the principle under which his discretion was to be exercised;

(b) the judge took into account matters which he ought not to have or failed to take into account matters which he ought to have; or

(c) the judge's decision was plainly wrong.

(See also *Mahmod Binkailan v Goh Seng Choon & Anor* [1976] 2 MLJ 239; *Topaiwah v Salleh* [1968] 1 MLJ 284 (FC)).

[10] Secondly, it is fundamental and trite that a plaintiff claiming damages must prove his damage. A plaintiff cannot simply make a claim without placing before the court sufficient evidence of the loss it has suffered even if it is otherwise entitled in principle to recover damages. The law, however, does not demand that the plaintiff prove with complete certainty the exact amount of damage that he has suffered. Thus, the learned author of *McGregor on Damages* states as follows (at para 8-002):

> [W]here it is clear that some substantial loss has been incurred, the fact that an assessment is difficult because of the nature of the damage is no reason for awarding no damages or merely nominal damages. As Vaughan William LJ put in in *Chaplin v Hick* [[1911] 2 KB 786], the leading case on the issue of certainty: 'The fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages'. *Indeed if absolute certainty were required as to the precise amount of loss that the claimant had suffered no damages would be recovered at all in the great number of cases. This is particularly true since so much of damages claimed are in respect of prospective, and therefore necessarily contingent, loss*. (Emphasis added.)

[11] Thirdly, the assessment of damages in action in this nature does not admit of fixed rules and mathematical precision, but is a matter left to the sound discretion to the judges. The courts refuse to lay down any rules or mathematical formula by which such damages are to be assessed by judges. The fairness and reasonableness of the award cannot be subjected to any recognised test or measure by any certain standard. If the award is manifestly inadequate or excessive, or there are indications that the award was influenced by improper considerations or the mistake was too plain, the appellate court should not

hesitate to remedy the trial court's error. All the courts should do are to award sums which is reasonable, moderate and conventional.

[12] We now proceed to consider the merits of these appeals.

GENERAL DAMAGES

[13] The learned JC had reduced the amount of general damages from RM2m to RM55,000. Learned counsel for the plaintiff submitted the learned JC erred in law and/or in fact when he reduced the quantum award as His Lordship did not find the SAR had acted upon a wrong principle of law. In his decision at para 27, the learned JC stated:

> I also reduced the amount of general damages awarded to the plaintiff to RM55,000 which is intended to compensate the plaintiff for losses suffered that were the natural and direct result of the tortious acts of the defendants.

[14] It is trite that a person injured by another's wrong is entitled to general damages for non-pecuniary such as his pain and suffering, hardship, discomfort, mental distress and loss of amenities of life. There is no standard rule to measure the damage in such cases. The courts usually determine the amount based on a fair and reasonable standards, free from sentimental or fanciful standards, and based upon evidence adduced. The court should also consider the age, health and condition of the injured party pre-injury as compared with his condition after the injury. The court also consider the need for medical, psychological or physical symptoms, and the impact on the plaintiff's conduct and lifestyle before apportioning the amount of damages.

[15] We have scrutinised the evidence on record and found that the plaintiff did not produce sufficient evidence, such as a medical report, to corroborate his claim that she and her family had suffered stress and trauma resulting from the respondents' trespass, conversion and detinue.

[16] There is, however, some evidence to establish that the plaintiff had endured hardship when the defendants had wrongly seized her goods in their raid and she had lost her capital and could not pay off her business creditors as the monies loaned were invested in the seized goods. Consequently, the plaintiff was forced to sell her assets, including her car, house and jewellery.

[17] In our view, the fair and reasonable amount is RM500,000.

SPECIAL DAMAGES

[18] Special damages, according Lord Macnaghten in the oft-cited case of *Stroms Bruks Akt Bolag v Hutchison* [1905] AC 515 at pp 525–526, HL (SC):

> ... are such as the law will not infer from the nature of the act. They do not follow in ordinary cause. They are exceptional in character and therefore they must be claimed specially and proved strictly.

[19] Indeed, because of their peculiar nature, the law required a plaintiff to give warning in his pleadings of the items constituting his claim for special damages with sufficient specificity in order that there may be no surprise at the trial (see *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324).

[20] We agreed with the submission of learned counsel for the plaintiff that the learned JC had erred in law and/or in facts when His Lordship had allowed the defendants' appeal and reduced the special damages that were assessed from RM2,012,100 to RM55,000.

[21] During the assessment of damages proceedings before the SAR, the plaintiff had relied on the evidence of one Encik Monaharan a/l Muthiah ('SP1'), a chartered accountant, who had introduced the following documents in support of his witness statement:

(a) financial report for Sri Tirumaala Metal as of 31 December 2005 (at pp 315–321 ROA *Bahagian* C *Jld* 1);

(b) financial report for Sri Tirumaala Metal as of 31 December 2006 (at pp 315–321 ROA *Bahagian* C *Jld* 1);

(c) Sri Tirumaala metal's tax computation for 31 December 2005 (at pp 322–328 ROA *Bahagian* C *Jld* 1);

(d) Sri Tirumaala metal's tax computation for 31 December 2005 (at pp 322–328 ROA *Bahagian* C *Jld* 1);

(e) Sri Tirumaala management accounts for 31 March 2007, 30 June 2007, 30 September 2007, and 31 December 2007 Sri Tirumaala metal's tax computation for 31 December 2005 (at pp 322–328 ROA *Bahagian* C *Jld* 1); and

(f) breakdown of inventory as at 10 January 2008 (exh 'P11') (Tab 7 of core bundle, at p 376 of ROA *Bahagian* B).

[22] The plaintiff herself had tendered evidence to introduce the following documents, among others, in support of the claim in her witness statement (Tab 8 of core bundle, at pp 291–293 of ROA *Bahagian* B):

(a) 'The List of Goods and Quantities Which Taken Away From Plaintiff Premises By DBKL (Market Price)' ('exh P12') (at Tab 9 of core bundle, at p 376 of ROA *Bahagian* B); and

(b) 'The List of Goods and Quantities Which Taken Away From Plaintiff Premises By DBKL (Cost Price)' ('exh P12') (at Tab 10 of core bundle, at p 376 of ROA *Bahagian* B).

[23] Based upon SP1's and SP2's evidence, the learned SAR found that:

(a) SP1 had attended the plaintiff's premises on 10 January 2008 for the purposes of preparing the financial report dated 31 December 2007 and had prepared 'Breakdown of Inventory as at 10 Jan 2008' ('exh P11') (at Tab 7 of core bundle, at p 376 of ROA *Bahagian* B) which provided that value of the plaintiff's goods at the material time was RM1,861,886;

(b) six days after the preparation of 'Breakdown of Inventory as at 10 Jan 2008', the plaintiff had her accountant, SP1, prepare 'The List of Goods and Quantities Which Taken Away From The Plaintiff Premises By DBKL (Market Price)' ('exh P12' (at Tab 9 of core bundle, at p 376 of ROA *Bahagian* B) which provides that the cost of the goods at the time of the conversion was RM1,909,086; and

(c) the plaintiff had her accountant, SP1, prepared 'The List of Goods and Quantities Which Taken Away From The Plaintiff Premises By DBKL (Cost Price)' ('exh P13') (at Tab 10 of core bundle, at p 376 of ROA *Bahagian* B) which provides that the market price of the goods at the time of the conversion was RM2,012,100.

[24] In our view, the learned JC fell into serious error in holding that the plaintiff had failed to prove that the financial statement correctly recorded that amount of stock that was held in the business at the material time. The plaintiff's case was that its level of stock as at 31 December 2006 of RM38,410 had increased to RM1,541,335 as at 31 December 2007. At no time during the assessment of damages proceedings or in the course of argument before the SAR the financial statement was challenged or disputed. Nor it was pleaded so. The learned JC had reduced the quantum of award of special damages from RM2,012,100 to RM55,000 by way of his own calculation, employing a 'straight line base method' of calculation.

[25] It is pertinent to note that the learned JC himself had admitted that the issues of the financial statement were never raised in the assessment of damages proceedings before SAR. At para 22 of his grounds of judgment, His Lordship had this to say:

> [22] I raised these points to counsel, in the course of their submissions. I was informed that these points were not previously considered by counsel, and accordingly PW1 had not the opportunity to explain what I considered to be discrepancies in the balance sheet for FY2007.

[26] It is fundamental to the litigation process, including assessment of damages proceedings, be decided within the boundaries of the pleadings. The parties to a legal suit are entitled to a resolution of their differences on the basis of the issues pleaded in the pleadings. A finding on a basis that was not pleaded in the pleading cannot stand. It deprives the parties of the opportunity to address that issues in the evidence at trial. By stepping outside of the pleadings, the learned JC denied the plaintiff the right to know the case she had to meet and the right to a fair opportunity to meet that case.

[27] In our view, there is no quarrel to the settled legal propositions that unless foundation has been laid in the pleadings, no argument is permissible to be raised on that particular point. In *J Jermons v Aliammal & Ors* (1999) 7 SCC 382, while dealing with a similar case, the Indian Supreme Court held as follows:

> ... there is a fundamental different between a case of raising additional grounds based on the pleadings and the material available on record and a case of taking a new plea not borne out of the pleadings. In the former case no amendment to pleadings is required, whereas in the latter it is necessary to amend the pleadings. The respondents cannot be permitted to make out a new case by seeking permission to raise additional grounds in revision ...

[28] The learned SAR had meticulously combed the evidence adduced in support of the plaintiff's claim for special damages. We found no cogent reason to disturb the award handed down by the learned SAR. In our view, the learned SAR was right in awarding RM2,012,100 for special damages which was the market price of the goods at the time of conversion.

[29] In the premise, we allowed the plaintiff's appeal in respect of special damages and set aside the award rendered by the learned JC. We restored the award of the learned SAR.

AGGRAVATED AND EXEMPLARY DAMAGES

[30] Learned counsel for the defendants submitted that aggravated damages ought not to have been awarded or alternatively the award of RM2m is excessive and ought to be reduced.

[31] In reply, learned counsel for the plaintiff submitted that the learned SAR's decision to award exemplary damages should be maintained. He urged the court to apply the principles in *Sin Heap Lee – Marubeni Sdn Bhd v Yip Shou Shan* [2005] 1 MLJ 515 and *Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1993] 1 MLJ 443 and calculate the award of exemplary damages at 25% of the award for compensatory damages ('progressively reducing scale award').

[32] Now, aggravated damages are classified as a species of compensatory damages, which are awarded as additional compensation where there has been intangible injury to the interest of personality of the plaintiff, and where this injury has been caused or exacerbated by the exceptional conduct of the defendant.

[33] The exemplary damages or punitive damages — the two terms now regarded as interchangeable — are additional damages awarded with reference to the conduct of the defendant, to signify disapproval, condemnation or denunciation of the defendant's tortious act, and to punish the defendant. Exemplary damages may be awarded where the defendant has acted with vindictiveness or malice, or where he has acted with a 'contumelious disregard' for the right to the plaintiff. The primary purpose of an award of exemplary damages may be deterrent, or punitive and retributory, and the award may also have an important function in vindicating the rights of the plaintiff (see *Rookes v Barnard* [1964] 1 All ER 367; *AB and others v South West Water Services Ltd* [1993] 1 All ER 609; *Broome v Cassell & Co Ltd* [1971] 2 QB 354, *Laksmana Realty Sdn Bhd v Goh Eng Hwa and another appeal* [2006] 1 MLJ 675).

[34] In these appeals, the learned JC maintained the SAR's award of aggravated damages and applied the same principles that were used by the learned SAR in respect of the award of exemplary damages. At paras 30–33 of the grounds of judgment, the learned JC stated:

> [30] Counsel for the defendants submitted that the award of both exemplary and aggravated damages were wrong, as there had to be special circumstances to justify punishing the defendants, taking into account the principle that exemplary damages are punitive in nature. In the present case, the defendants and argued counsel — were only carrying out their statutory duties.
>
> [31] The registrar clearly considered that the actions of the defendants justified the award of exemplary damages (see paras 58–70 of his grounds of judgment), as their actions infringed upon the constitutional rights of the plaintiff. It is no answer to say that the defendants were merely carrying out their statutory duties, if the manner in which those duties had been carried out trammelled upon the constitutionally-guaranteed rights of the plaintiff. It has also to be remembered that the plaintiff's business was not an illegal business, as explained by the learned judge in her grounds of judgment.
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> [32] Again, applying the test in *Davis v Powell Duffryn Associated Collieries Ltd*, I am not satisfied that the Registrar, in ascertaining the amount of exemplary damages, has acted on a wrong principle of law, has misapprehended the facts or has made a wholly erroneous estimate of the damages suffered as would justify this court to exercise its appellate powers to disturb such assessment.
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> [33] Accordingly, the decision of the Registrar on the award of RM2,000,000 as aggravated damages was affirmed. The exemplary damages were calculated as 25% of the total for all other heads of damages, which amounted to RM527,500.

[35] We agreed with the concurrent findings of the learned SAR and the learned JC that the plaintiff is entitled to exemplary damages. At the trial to determine the liability, Hue Siew Kheng J found that the respondents was liable for the trespass, conversion and detinue on the plaintiff's good that were seized by the respondents. According to the learned judge, although the defendants had the right to remove the plaintiff's goods from the land concerned, they did not have the right to convert the plaintiff's goods. By converting the plaintiff's goods which the defendants had seized, the defendants had deprived the plaintiff of her right under art 13 of the Federal Constitution. The defendants have, as government servants, acted in an oppressive and unconstitutional manner and therefore the plaintiff is entitled for the award of exemplary damages.

[36] The remaining issue to be determined is the amount of damages. In *Rookies v Barnard*, Lord Devlin set out three basic principles of the assessment of quantum in exemplary damages cases. His Lordship held that in order to recover damages, the plaintiff must have been the victim of the punishable behaviour involved. This stipulation was necessary since 'the anomaly inherent in exemplary damages would become an absurdity if a plaintiff totally unaffected by some oppressive conduct which the jury wish to punish obtained a windfall in consequence'. Secondly, Lord Devlin specified that exemplary damages should be assessed with restraint and, thirdly, that the means of the parties should be taken into consideration. In addition to these rules, Lord Devlin also stipulated that exemplary damages should be awarded 'if but only if' the sum of compensatory (including aggravated) damages to be awarded had an insufficient punitive or deterrent effect.

[37] The principle of moderation was again stressed in *John v MGN Ltd* [1997] QB 586, where the court stated that the quantum of an exemplary damages award should be the minimum 'necessary to meet the public purpose' of the damages.

[38] It is interesting to note that in the United States, one of the principles of moderation which has been enunciated by the Supreme Court as indicative of whether a punitive award is constitutionally acceptable as not being excessive, is whether the award is proportionate to the harm suffered by the plaintiff, and therefore the sum awarded in compensatory damages in the same case. In *BMW of North America, Inc v Gore* (1996) 116 SCt 1589, the US Supreme Court for the first time struck down an award of punitive damages on the grounds that it was excessive and therefore unconstitutional. The Supreme Court established three 'guideposts' by which to judge whether an award of punitive damages was excessive. These were: the degree of reprehensibility of the defendant's conduct; the disparity between the harm to the plaintiff and the damages awarded; and the difference between the exemplary damages imposed

and the civil penalties imposed in comparable cases.

[39] The principles of moderation and restraint has been followed by other jurisdictions as well. The Irish courts, for example, held that exemplary damages should be in proportion to the compensatory damages awarded in the same case. In *McIntyre v Lewis* [1991] 1 IR 121, O'Flaherty J stated this principle and found that the exemplary award made in that case, which was twelve times the compensatory damages, did not bear a sufficient relation to compensation. O'Flaherty J observed:

> The award of exemplary damages is anomalous and where such damages are awarded ... the judge or jury must keep them on a tight rein. If the compensatory amount awarded includes aggravated damages then I believe if any award is made by way of exemplary damages it should properly be a fraction rather than a multiple of the amount awarded by way of compensatory damages (including aggravated damages).

Hederman J, in the same case, also stated that the exemplary damages should bear some relation to the damages awarded in compensation, and reduced the exemplary award accordingly.

[40] So too in United Kingdom. In *Thompson v Commissioner of Police of Metropolis* [1997] 2 All ER 762, Lord Woolf observed:

> ... We do not think it is possible to indicate a precise arithmetical relationship between basic damages and aggravate damages because the circumstances will vary from case to case. In the ordinary way, however, we should not expect the aggravated damages to be as such as twice the basic damage except perhaps where, on the particular facts, the basic damage are modest.

[41] In the same vein, the Singapore Court of Appeal in *Koh Sin Chong Freddie v Chan Cheng Wah Bernard and others and another appeal* [2013] 4 SLR 629 stated at p 652:

> ... we are nonetheless of the view that there should be some semblance of proportionality between the quantum of damages and aggravated damages awarded ...; and
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> ... Aggravated damages are meant to compensate for the aggravation of the injury; they are not an arbitrary top-up unrelated to the desire of the court to compensate the plaintiff for the aggravation.

[42] Taking also the following factors into consideration:

(a) the legality of the underlying enforcement action;

(b) the length of time (3+ years) given by the first defendant to the plaintiff to right matters before the enforcement action was actually taken;

(c) the plaintiff's disregard of the warnings/notices;

(d) there was no malice on the part of the defendants;

(e) the plaintiff knew that her business operations were unlicensed; and

(f) the plaintiff knew that enforcement action was forthcoming,

we are of the considered view that the reasonable and fair amount for aggravated damages is RM300,000. Applying the principles in *Sin Heap Lee – Marubeni Sdn Bhd* that the award for exemplary damages should be calculated at 25% of the award for compensatory damages, the amount of exemplary damages to be awarded to the plaintiff in these appeals is RM703,025.

[43] Before departing, we would like to emphasis again that exemplary damages are not intended to compensate the plaintiff and are not recoverable as a matter of right. The amount of the exemplary damages award is left to the judge's discretion and is determined by considering the character of the defendant's misconduct, the nature and extension of the plaintiff's injury and the means of the defendant. The quantum of exemplary damages to be awarded must be appropriate to the wrongdoing inflicted to the parties involved. Exemplary damages must not be uncontrolled or arbitrary; they must be of an amount that is the minimum necessary to achieve their purpose in the context of the particular case.

ORDERS

[44] At the conclusion of the hearing, we made the following orders:

(a) in respect of Appeal 55, we allowed the plaintiff's appeal in part. We set aside the award of special damages rendered by the learned JC and restored the award by the learned SAR ie RM2,012,100. For general damages, we varied the award of the learned JC and substituted with the amount of RM500,000;

(b) in respect of Appeal 56, we allowed the defendants' appeal in part. For aggravated damages, we varied the award of the learned JC and substituted with the amount of RM300,000;

(c) applying the principles in *Sin Heap Lee – Marubeni Sdn Bhd*, the amount of exemplary damages to be awarded to the plaintiff is RM703,025;

(d) we make no order as to costs. Parties to bear own costs; and

(e) deposits was refunded.

A *Order accordingly.*

Reported by Ashok Kumar

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